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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-527

G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,

Petitioner and Plaintiff,

vs.

5 GILL NETS, etc.,

Defendants,

RAYMOND MATTZ,

Respondent and Intervenor.

On Petition for a Writ of Certiorari to the California Court of Appeal, First District, Division Three

Petitioner's Reply to Amicus Memorandum of United States

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We file this brief, pursuant to Rule 24(4), to reply to new arguments and issues raised by the United States in its amicus memorandum.

Initially, we find it difficult to understand the United States' position that California is without jurisdiction to regulate Indian fishing under the circumstances of this case. The United States' position is not necessary to protect any federal interest, since the United States does not regulate, and has never sought to regulate, Indian fishing on the reservation. Nor is its position necessary

to protect any tribal interest in self-government, since the tribe does not regulate, and does not seek in this case to regulate, such fishing. In view of this lack of federal or tribal interest, the United States' position, in seeking to deny California's regulatory efforts, promises to create an anarchical situation with respect to Indian fishing on the reservation: in fact, this promise is now in the process of fulfillment. Pet., App. 6. This result, we submit, does not further the legitimate interests of the Indian community, which cannot benefit from the regulatory void which California seeks to fill. Nor does this result protect the interests of California, which hopes, in filling this void, to protect the fishery resource. Thus, the United States, in a surprisingly inflexible response to a fishing dispute between a state and an Indian, has ignored the fact that federal and tribal interests do not need or deserve protection from state interests under the facts of this case.

1. Public Law 280.

In our opening brief, we argued that the savings provision in Public Law 280, which is limited to Indian fishing and hunting rights "afforded" under a federal "treaty, agreement or statute," 67 Stat. 588 (1953), 18 U.S.C. § 1162 (1970), is not applicable to claimed rights based on a presidential executive order. The United States has responded that executive orders have frequently been held to authorize the creation of Indian reservations and rights, citing the decisions in *Arizona v. California*, 373 U.S. 546 (1963), and *Seymour v. Superintendent*, 368 U.S. 51 (1962). Amic. Memo., 5.

The United States' argument is not responsive to our position. The question in this case is not whether Indian fishing rights were *created* by the executive orders issued in 1855 and 1891. Rather, the question is whether such rights, assuming *arguendo* that they were created by the

executive orders, *survived* the passage of Public Law 280, at least to the extent that such rights are beyond the reach of State law. Indeed, Congress, by passing Public Law 280, intended to obviate the necessity of considering the very issue raised by the United States, *i.e.* whether such rights were created in the first place.

In our petition, we suggested that Congress, in refusing to include executive orders within the savings provision in Public Law 280, was motivated by the fact that Indian rights based on executive orders have traditionally been given less sanctity than Indian rights based on treaties, agreements or statutes. Pet., 18-25; *Sioux Tribe v. United States*, 316 U.S. 317 (1942). This distinction, we suggested, derives from the fact that executive orders—unlike treaties, agreements or statutes—are not subject to congressional approval. Thus, Congress apparently did not wish to perpetuate claimed "rights" based on executive orders —particularly because of the extent to which such "rights" might impair vital conservation interests of the states—unless the intent to establish such rights could reasonably be inferred from the congressional act authorizing the issuance of the executive order. This analysis of the congressional intent, we pointed out, is supported by the judicial reluctance to infer the creation of Indian fishing "rights" based on executive orders, where such "rights" are inconsistent with state laws, in the absence of a reasonably clear expression of Congress' intent to authorize the creation of such rights. See *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Metlaktala Indian Community v. Egan*, 369 U.S. 45 (1962). The United States, by arguing that an executive order can under some circumstances result in the creation of Indian rights, has advanced a proposition that is unassailable, but that is not relevant to the issues in this case.

Next, the United States argues that the reservation in this case was created by a statute, within the meaning of the savings provision in Public Law 280, because the executive orders establishing the reservation were issued pursuant to congressional acts of 1853 and 1855. Amic. Memo., 7. This argument is merely an effort to accomplish indirectly what Congress, by refusing to include executive orders in the savings provision, forbade to be accomplished directly. In fact, Indian reservations were commonly created by executive orders prior to 1887, although such orders were not issued pursuant to congressional authorization; Congress passed an act in that year requiring that such executive orders be issued pursuant to congressional authorization thereafter. 24 Stat. 388 (1887); *Sioux Tribe v. United States, supra;* Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off., 1942), 299. Thus, the United States' argument would distinguish between executive orders issued before and after 1887, with respect to the effect of Public Law 280. This distinction is wholly unrelated to the purposes for which Public Law 280 was passed. Finally, the 1853 and 1864 congressional acts involved in this case did not even create the reservation, much less the rights of Indians on the reservation; rather, they merely authorized the President to create undefined reservations for undefined tribes at undefined locations for undefined purposes. It is simply a perversion of the congressional intent to suggest that these congressional acts fall within the savings provision in Public Law 280.

The United States argues that the Court in *Metlakatla Indian Community v. Egan,* 369 U.S. 45 (1962), regarded the savings provision in Public Law 280 as including a "regulation." Amic. Memo., 6. As mentioned in our petition, the *Metlakatla* Court observed that Congres *itself,* by authorizing the Secretary of the Interior to issue regulations regarding Indian fishing, intended for such fishing to be regulated by federal rather than state authorities, and that the Secretary in fact exercised this authority by closely regulating such fishing. Pet. 22-24. This decision hardly supports the position of the United States here, where Congress failed to provide for federal rather than state control of Indian fishing, and even failed to directly create the reservation itself. In fact, since neither federal nor tribal authorities regulate, or seek to regulate, Indian fishing on the reservation in this case, the United States' position would result in a situation where—unlike *Metlakatla*—the fishery resource is lacking in any responsible management or control whatsoever. Surely the *Metlakatla* Court would not have tolerated such an ecologically unsound result.

The United States, in its memorandum, has totally ignored the language, legislative history and surrounding circumstances of Public Law 280. First, the United States ignored the fact that the language of the savings provision makes no reference to executive orders. Second, it ignored the fact that the provision was amended, by changing the word "law" to "statute," 99 Cong. Rec. 9962, 83rd Cong., 1st Sess. (1953), to exclude executive orders. Third, it ignored the fact that the amendment was made at the urging of the Department of the Interior, in order to make the provision as "precise and certain" as possible and to assure that it would include only rights that were "expressly" contained in treaties, agreements or statutes. California's Exhs. 6(k), 6(g). Fourth, it ignored the fact that the Commissioner of Indian Affairs, after long study, concluded that there was no federal "statute," much less a federal "treaty" or "agreement," that prohibits California from applying its fishing laws to its Indians, after the

passage of Public Law 280. California's Exh. 6(f). Thus, the United States, apparently reflecting a newly-formed position of the Department of the Interior, is seeking to change a congressional policy that was originally established at the behest of that Department, and that was contemporaneously construed by the Department in a manner different from that now suggested by the United States. If this congressional policy is to be changed, it must be changed by Congress, not by executive fiat. The United States is in effect is attempting to "remake history," notwithstanding Justice Stewart's admonition, in *DeCoteau v. District Court*, 420 U.S. 425, 449 (1975), that it may not do so.

2. Non-Indian Owned Lands.

We noted in our petition that the *specific* language of the 1891 executive order establishing the reservation, and the *specific* language of the 1892 congressional act opening up the reservation for homestead entry and settlement, precluded the Indians from exercising tribal rights on lands owned by non-Indians within the reservation. Pet., 28-29. The United States made no reference to this language in its memorandum, and thus hardly made an effort to respond to our argument.[1]

3. Subsistence Fishing.

The Court of Appeal held that the Indians may fish "for subsistence purposes" on the reservation, in violation of

1. The United States stated that the nets were stored on privately-owned lands "without objection by the landowner." Amic. Memo., 8. This is not true. The nets were stored on lands owned by the Simpson Logging Company, CT 135, which is now contesting in litigation the right of Indians to trespass, for fishing purposes, on lands owned by the logging company within the reservation. See *Blake et al. v. Arnett et al.*, U.S. Dist. Ct., No. C-72-2140 (N.D. Cal.). That case has been stayed pending outcome of the instant matter.

California law. Pet., App. 1, pp. 4, 12. We argued, in our petition, that the California Legislature may properly determine the circumstances for such subsistence fishing. Pet., 32-36. We then pointed out that the Legislature, by passing a statute in 1951 that allows Indians on the reservation to fish "for subsistence purposes" but prohibits the use of gill nets for that purpose, has concluded that gill nets are not necessary for subsistence fishing. *Ibid;* Cal. Fish & Game Code § 7155. Thus, even if the Indians have the right to fish for subsistence purposes, California may prohibit the use of gill nets for that purpose.

The United States has responded by claiming that the Indians on the reservation should not be limited to subsistence fishing, but should also be allowed to fish for commercial purposes in violation of California law. Amic. Memo., 8. Thus, the United States has not defended the lower court's conclusion that the Indians are limited to subsistence fishing; instead, it has advanced a new theory that, although not advanced below, was apparently rejected by the lower court. We fail to see how the Indians on the reservation in this case can be held to have the right to fish for commercial purposes, since they did not *traditionally* fish for commercial purposes and since they do not even claim this right. Perhaps this question will be raised and resolved in a future case. In any event, the issue has not been raised here, and cannot be resolved here. Thus, the United States has simply failed to respond to our argument that the state's legislature may properly determine, and has determined, that the use of gill nets is not necessary for subsistence purposes.

4. Conservation.

In response to our argument that California has the right to regulate Indian fishing for conservation purposes,

Pet., 37-42, the United States notes that it knows of "no authority that would permit state regulation of Indian fishing *within* an Indian reservation for conservation purposes." Amic. Memo., 9. (Emphasis in the original.) This statement indicates only, as we have noted, that this issue is one of first impression, and thus deserves the attention of this Court. The United States also argues that "there has been no such showing here [of the necessity for regulating Indian fishing]." *Ibid.* In our petition, we described at length the evidence which supports our view that the regulation of the fishery is a vital conservation measure, Pet., 37-42, and the United States, again failing to respond to our argument, made no reference to this evidence whatsoever.

CONCLUSION

The United States, in its memorandum, has consistently avoided meeting the arguments raised in our petition. This deficiency convincingly suggests that its position is not based on the law, but represents an executive revision of a long-standing congressional policy. We urge the Court to grant our petition in order that California may continue to exercise the jurisdiction which it has historically exercised pursuant to that congressional policy.

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